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95-2035

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES MOORMAN, KATHLEEN MOORMAN and YOUR LOCAL FENCE, INC.,

Petitioners,

v.

DEPARTMENT OF COMMUNITY AFFAIRS,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Nollan v. California Coastal Commission,
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STATEMENT OF THE CASE

Respondent, State of Florida, Department of Community Affairs (DCA), agrees with Petitioners' statement of the case, except as follows.

The Court should disregard the references to the testimony of property owners, other than the Moormans, concerning the issuance of other permits because the Moormans' permit was the only one at issue in the Florida state courts. Also, Petitioners' description of the Florida supreme court's decision is inaccurate and misleading.

Petitioners claim that the Florida supreme court "failed and neglected to address or recognize the rights of Your Local Fence, Inc. as a business operation constructing fences throughout Big Pine

Key, Monroe County, Florida." (Petition at 18). However, Petitioners never argued the rights of Your Local Fence, Inc. before either the district court of appeal or the state supreme court. In any event, the "right" of Your Local Fence, Inc. to make money does not rise to the level of constitutional importance. Therefore, this portion of Petitioners' statement of the case should be disregarded.

Additionally, Petitioners claim that the Florida supreme court "neglected to address the question of [the] unconstitutional broad base and of the arbitrary and capricious nature of the subject land development regulation." (Petition at 21). However, this is exactly what the Florida supreme court

did address in passing on the facial constitutionality of the ordinance. The issue was simply not decided in Petitioners' favor.

Lastly, Petitioners' statement that the Florida supreme court's decision is directly contrary to the determinations of this Court (Petition at 21 - 23) is incorrect. The decision of the Florida supreme court is perfectly aligned with the rational nexus test established by this Court in Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). More importantly, this Court's decision in Nollan, which was based, in part, on the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution, is not relevant in

evaluating the Florida supreme court's decision in this case. Contrary to Petitioners' assertions, the Florida supreme court did not address and the Petitioners did not raise any federal constitutional claims. Also, the Florida supreme court's decision, which interprets provisions of the state constitution, is clearly not based on federal constitutional caselaw. Therefore, the whole Nollan discourse in Petitioners' statement of the case belies the fact that this Court would be improperly (for no special or important reason) expanding its discretionary jurisdiction on writs of certiorari, contrary to its established caselaw, were it to grant the petition in this case.

SUMMARY OF ARGUMENT

The Florida supreme court did not address and Petitioners did not raise any federal constitutional claims in this case. The Florida supreme court addressed only state constitutional law claims. Additionally, in passing on the state constitutional claims that were presented in this case, the Florida supreme court did not rely on any decisions of this Court. Consequently, Petitioners have failed to properly invoke the discretionary conflict jurisdiction of this Court, and the Petition for Writ of Certiorari should be denied.

ARGUMENT

THE CONFLICT JURISDICTION OF THIS COURT HAS NOT BEEN PROPERLY INVOKED BECAUSE THE FLORIDA SUPREME COURT'S DECISION DID NOT ADDRESS ANY FEDERAL QUESTIONS CONCERNING THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Contrary to Petitioners' assertions, the Florida supreme court did not address whether the Monroe County fence ordinance was unconstitutional under the federal constitution. Also, Petitioners raised no such claim in the Florida courts. In Department of Community Affairs v. Moorman, 664 So.2d 930 (Fla. 1995), the Florida supreme court was presented with and decided state constitutional due process claims. Consequently, Petitioners' stated reasons for invoking this Court's jurisdiction have no basis in law or fact, as more fully explained

below.

Petitioners claim that the discretionary conflict jurisdiction of this Court has been properly invoked under Supreme Court Rule 10.1(c) because the Florida supreme court, the state court of last resort, "has decided a Federal question in a way that conflicts with the applicable decisions of the United States Supreme Court." (Petition at 8). Specifically, Petitioners contend that the Florida supreme court's decision is in direct conflict with this Court's establishment of the rational nexus test in Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987). The Nollan rational nexus test was based, in part, on the due process requirements of the

Fifth and Fourteenth Amendments to the Constitution of the United States.

Petitioners' contentions in this regard are blatantly incorrect. The Florida supreme court did not address and Petitioners did not raise any federal constitutional claims. In this case, the Florida supreme court squarely passed judgment on claimed due process violations under the state constitution. Therefore, under this Court's well-settled precedent, Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469 (1983), this Court should refuse to grant the petition for review. As this Court has repeatedly and wisely stated, "'[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.'" Id. at 3476

(quoting Minnesota v. National Tea Co., 309 U.S. 551, 557, 60 S.Ct. 676, 679 (1940)).

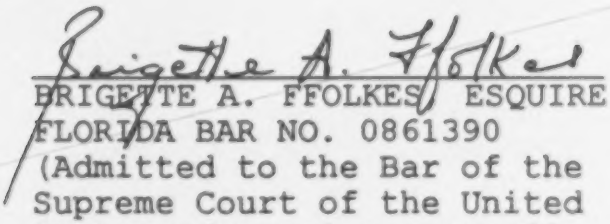
Additionally, in passing on the state constitutional claims that were presented in this case, the Florida supreme court relied exclusively on its own decisions. The Florida supreme court clearly did not rely on any of the decisions of this Court, including the Nollan decision, to construe state constitutional provisions. Therefore, there is no basis for saying that the Florida supreme court's decision in this case was grounded in federal caselaw.

CONCLUSION

Based on the foregoing argument, Respondent, State of Florida, Department of Community Affairs, respectfully

requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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